Supreme Court of the United States

OCTOBER TERM, 1940.

No. 524.

DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship IDEFJORD, her engines, etc.,

Petitioner,

against

BLUMENTHAL IMPORT CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONER SUBMITTED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN W. GRIFFIN,
Counsel for Petitioner,
80 Broad Street,
New York, N. Y.

WHARTON POOR,
JAMES MCKOWN, JR.,
of Counsel.

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

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Comment upon the brief submitted on behalf of the respondent would not be required were it not felt necessary to call attention to certain incorrect statements therein.

I

At page 2, respondent states that the Circuit Court of Appeals did not accept the District Court's findings of fact.

In *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 114 F. (2d) 248 (C. C. A. 2), the Circuit Court of Appeals held that findings of fact by the District Court in Admiralty were entitled to the same measure of conclusiveness as provided for in Rule 52(a) of the Rules of

Civil Procedure, which rule provides that in all actions tried upon the facts without a jury "findings of fact shall not be set aside unless clearly erroneous * * *" (114 F. [2d] at p. 250).

The Circuit Court of Appeals did not suggest or intimate that any finding of the District Court in the case at bar was "clearly erroneous" or in anywise incorrect. It differed from that Court with respect to legal principles. In explanation of the grounds on which the result was reached, the Circuit Court of Appeals summarized the findings of the District Court, but did not purport to set any of them aside or to make any new findings of fact of its own.

II

Respondent's brief makes some comment upon the five so-called bills of lading issued by Pitellos & Co. at Alexandria. These documents acknowledged receipt of shipments of wool on board various vessels to be carried to Port Said and there to be transshipped by Pitellos & Co. on some other vessel to the United States. In so far as the transit from Port Said to United States was concerned, these anomalous documents merely evidenced a personal undertaking to transship on the part of Pitellos & Co.

A bill of lading is thus defined in the well-known treatise on Charter Parties and Bills of Lading by the late Sir Thomas Edward Scrutton, 14th Edition, at page 9:

> "A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship."

The so-called bills of lading on which respondent's case is based could properly be so described as regards the transit from Alexandria to Port Said, but from Port Said to the United States these documents merely evidenced

contracts between the shippers and Pitellos & Co., by which Pitellos & Co. agreed to effect transshipment on an independent auxiliary carrier. For further definition of a "bill of lading" see *Diamond Alkali Export Corp.* v. *Fl. Bourgeois,* L. R. (1921), 3 K. B. D. 443.

III

With reference to respondent's criticism of the statement in the petition that, when the wool arrived at Port Said no underdeck space was available for several months (Petition, p. 2, par. 5), the District Court found specifically (R., p. 283) that, when the merchandise arrived at Port Said, concern developed "at the prospect of a failure of ships to carry the goods below deck in the then near future" (R., p. 283); and further stated (R., p. 293), "there was the uncertainty of obtaining another ship to carry the wool." The only evidence as to the time during which the wool would have been required to remain at Port Said before underdeck space would become available is that several months would have elapsed (R., pp. 60-61), which reference is given in the petition.

IV

Page 3 of respondent's brief criticizes the statement in paragraph 7 of the petition that the contract under which the Idefjord received the bales was evidenced by the letters of Stapledon & Sons, the Port Said & Suez Coal Company, the Idefjord manifest, the mate's receipts and the bills of lading made out by the Port Said & Suez Coal Company. This finding was certainly made by the District Court (R., pp. 284-285) and, as a finding of fact, was not disputed by the Circuit Court of Appeals, which, however, erroneously decided that the contract was legally invalid.

V

Respondent cites at page 4 *The Delaware,* 14 Wall. 579, and *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial,* 263 U. S. 119. These cases hold, as pointed out in the brief annexed to the petition (pp. 21-22), that, if the master issues a clean bill of lading the goods cannot lawfully be carried on the ship's deck. In the case at bar the master of the Idefjord, an independent auxiliary carrier, did not issue any clean bill of lading, but, on the contrary, accepted the goods under a contract which provided for "on-deck" carriage.

VI

Respondent, in referring to *The St. Hubert,* 107 Fed. 727 (C. C. A. 3), cert. den. 181 U. S. 621, stresses minute differences in facts, but fails to distinguish the rule on which that decision was based, which is thus stated (p. 732):

> "Such new carrier was not in any way bound by the terms and stipulations of the through bills of lading, unless as they were expressly adopted by it as applicable to the particular service in which it was engaging."

Our law is not a wilderness of special instances, but consists of "principles which govern specific and individual cases as they happen to arise" (Mansfield, C. J., in *R.* v. *Bembridge,* Howell's State Trials, XXII, 155). The rule laid down in *The St. Hubert, supra,* and the decision in the case at bar are in direct conflict.

Respondent also asserts (Brief, p. 5) that, if the Idefjord were exonerated in this suit *in rem,* "no protection can be afforded to banks and merchants who are accustomed to relying upon such arrangements for financing imports."

In the case at bar respondent, if it relied upon the so-called bills of lading of Pitellos & Co. which were ultimately transferred to it, would be entitled to require Pitellos & Co. to justify its conduct in connection with the transshipment

and to pay damages if that conduct were improper. Banks and consignees are entitled, in any proper case, to a claim against the contracting carrier, but, as decided in *The St. Hubert, supra,* not against an independent auxiliary carrier which has performed the contract under which it received the goods.

Respectfully submitted,

JOHN W. GRIFFIN,
Counsel for Petitioner,
80 Broad Street,
New York, N. Y.

WHARTON POOR,
JAMES MCKOWN, JR.,
of Counsel.